IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1943

No.

JACK BARG,
Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS, AND SUPPORTING BRIEF.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

To the Honorable, the Supreme Court of the United States:

Your petitioner, Jack Barg, respectfully prays that a Writ of Certiorari issue to review a final judgment of the Supreme Court of Illinois, being the highest court of the state in which a decision could be had, entered in a criminal prosecution there entitled "*People of the State of Illinois* v. *Jack Barg*" (R. p. 23), reversing the judgment of the Criminal Court of Cook County, Illinois, in favor of the People of the State of Illinois (hereafter called the respondent) and remanding the case to the Criminal Court of Cook County (the trial court) with directions to enter a proper judgment in each case (R. p. 29). The petitioner is aggrieved by the final judgment of the said Supreme Court of Illinois.

A.

Summary and Short Statement of Matter Involved.

The petitioner, Jack Barg, a native born citizen of the United States, a resident of the City of Chicago and State of Illinois, on July 29, 1942, resided in 1236 South Albany Avenue, Chicago; that about 8:30 p.m. on the same day the petitioner and one Jack Levin, whom the petitioner had known about three weeks and to whom petitioner had on previous occasions loaned his automobile for a short period of time, were drinking in a tavern about a mile from his residence and in the neighborhood in which the petitioner resided (R. pp. 6, 18, 19).

Levin borrowed the petitioner's automobile and obtained the keys from the petitioner while both were in the tavern and promised that he would return in a short time. He did not return to the tavern until 2:45 a.m., July 30, 1942. The petitioner had remained in the tavern continuously during the absence of Levin and until Levin returned with petitioner's automobile. The owner of the tavern observing that the petitioner was under the influence of liquor requested Levin to drive the automobile and take the petitioner home (R. p. 19). Levin complied with the request of the owner of the tavern, Joseph Katz, and the petitioner and Levin entered the automobile between 3:00 a.m. and 4:00 a.m. when they left the tavern of Joseph Katz, located at 3044 Madison Street, Chicago. Levin was driving the automobile, the petitioner while sitting on the right side of Levin in the front seat had fallen asleep (R. pp. 6, 19).

Certain police officers, cruising with a squad in the neighborhood of Devon and Broadway overheard a call on the radio about 4:00 a.m. from which call they learned that some men had been tampering with an automobile in the vicinity of 62nd and North Hamilton (R. pp. 8, 13).

They did not receive a description of any particular car involved in the transaction, no description of the men nor any information as to how many men were involved. The police noticed the car which was being driven by Levin and were only attracted by the fact that no lights were burning on the automobile which they noticed was being driven south on Hamilton Avenue near Marshfield (R. p. 8).

The officers did not signal the driver of the car to stop and did not sound any siren to indicate they were police officers, but began a chase of the car being driven by Levin; the chase was for a distance of about two blocks when one of the officers fired several shots. Levin stopped the car immediately and ran away. The petitioner was awakened by the shots made by the officers and when the officers opened the door on the right side of the car, petitioner either alighted from the car or fell out on the ground (R. pp. 6, 7, 13, 15, 19).

The officers without any warrant searched the person of the petitioner, without his consent and obtained from the person of the petitioner a bunch of keys. They took the keys and unlocked the automobile trunk which was on the rear of the car and upon searching the trunk they found some automobile tires. After the search, made without a warrant the petitioner was arrested (R. pp. 6, 8).

Indictments were later predicated upon the automobile tires and other property which had been taken by the police officers as the result of the unlawful search of the automobile trunk attached to the automobile of the petitioner. None of the alleged contraband goods were visible until after the petitioner's keys had been taken from his pocket, his automobile trunk unlocked and a search of the trunk made by the officers without any warrant or other process. The officers had no knowledge that any automobile tires, golf balls or any other property had been taken

from the automobile alleged to have been tampered with in the vicinity of Hamilton Avenue and had no suspicion that Levin or the petitioner had been implicated in that particular crime or any other crime.

The indictments were consolidated for trial, before the court without a jury (R. p. 4).

Motion To Suppress.

In apt time and before trial had begun the petitioner filed a petition to suppress as evidence the automobile tires and other property obtained as a result of the illegal search and seizure, and upon which the indictments were predicated (R. pp. 5, 6). The petition recited the circumstances showing the illegality of the search of his person and automobile trunk and his arrest following the search; it alleged that the State's Attorney intended to introduce in evidence against the petitioner the property illegally seized and taken from his automobile trunk, further alleging that such procedure would violate his constitutional rights and deny to him the due process of law; the petition further alleged that the crimes of larceny, receiving stolen property and other offenses alleged in the indictments were solely based upon the property taken from petitioner's automobile trunk after the illegal search and seizure. It prayed that the tires and all other articles taken from the automobile trunk of the petitioner be suppressed as evidence.

Hearing On Motion To Suppress.

On the hearing of the motion to suppress, the petitioner testified to the facts above stated and in addition thereto that he had no knowledge that the automobile tires and other property taken by the police officers from the automobile trunk had been placed in his automobile trunk, and that he did not place them there (R. p. 7). The only other witness who testified on this hearing was Police Officer

Rosensweig who corroborated the facts above stated (R. pp. 7, 8, 9) and in addition thereto testified that "the car was not speeding and they were not violating any law", "We had to unlock the trunk, and got the keys from the defendant when we searched him", "When we searched the car we found some tires in the trunk", "We had no warrant for his arrest at the time we arrested him", "*We stopped the car on suspicion*", "The stopping of the car and the search of the defendant and the car was on suspicion that he might be involved in something" (R. p. 8).

The court denied the motion to suppress (R. p. 11).

The trial was had, petitioner was found guilty of the larceny of a motor vehicle tire and sentenced on each indictment to a term of ten years in the penitentiary, the sentences to run concurrently (R. p. 21).

B.

Statement of the Basis Upon Which It Is Contended that this Court Has Jurisdiction to Reverse the Judgment of the Supreme Court of Illinois.

The jurisdiction of this court to grant this petition for a writ of certiorari is invoked by Sections 237 (b) and 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U.S.C.A. 344, 350).

The judgment of the Supreme Court of Illinois sought to be reversed by your petitioner, is a judgment of the highest court of the State of Illinois (R. p. 30), and was rendered September 21, 1943. A petition for rehearing was duly filed October 16, 1943, (R. pp. 30-48), and the court having considered the petition for rehearing did, on November 11, 1943, overrule and deny said petition (R. p. 49), making said judgment of the Supreme Court a final judgment. An order was entered by Mr. Justice Murphy of this Honorable Court, February 1, 1944, extending the

time for the filing of the petition for certiorari to and including March 11, 1944. (R. p. 50).

The Supreme Court of Illinois in holding that a search on bare suspicion of the automobile trunk attached to an automobile belonging to the petitioner, without warrant or other process, and without the consent of the petitioner after the police had, on bare suspicion without warrant or consent, searched the person of the petitioner and took from the person of the petitioner his keys; and that the subsequent finding in the automobile trunk of contraband goods which were not visible until the trunk had been unlocked by said officers with the keys of the defendant, and the denial by the trial court of the motion and petition of the petitioner to suppress the evidence although timely made, and the subsequent introduction in evidence on the trial of a case of the automobile tires and other articles resulting from such search and seizure, over the objection of the defendant, was not a denial of due process of law and a denial of the equal protection of the laws as guaranteed by the Constitutions of Illinois and of the United States, conflicts with the prior decisions of the Illinois Supreme Court, *People* v. *Henneman*, 373 Ill. 603, 606; *People* v. *Dalpe*, 371 Ill. 607, 611, 612; *People* v. *Duchant*, 370 Ill. 650; *People* v. *Ford*, 356 Ill. 572; *People* v. *Macklin*, 353 Ill. 64, and *People* v. *McGurn*, 341 Ill. 632, and conflicts with applicable decisions of this Honorable Court, *Byres* v. *U. S.*, 273 U. S. 28, 71 L. Ed. 520; *Gouled* v. *U. S.*, 255 U. S. 298, 65 L. Ed. 647; *Boyd* v. *U. S.*, 116 U. S. 616, 29 L. Ed. 746; *Weeks* v. *U. S.*, 232 U. S. 383, 58 L. Ed. 652; *Amos* v. *U. S.*, 255 U. S. 313, 65 L. Ed. 655, and such holding by the Supreme Court of Illinois deprives your petitioner of his liberty without due process of law and denies to him the equal protection of the laws.

The denial of due process of law as guaranteed by Article II, Section 2 of the Illinois Constitution, which sec-

tion of the Constitution is the same as the due process of law clause of the United States Constitution, was raised in the trial court on the motion and petition to suppress, and the petitioner under the applicable decisions of the Supreme Court of Illinois had a right to rely upon his belief that the Supreme Court of Illinois would adhere to its former decisions which hold that a search and arrest of a citizen on bare suspicion deprives the citizen of his constitutional rights, and that it was error for a trial court to deny a motion and petition to suppress, when timely made. The Supreme Court of Illinois in failing to follow the applicable decisions of Illinois and of this Honorable Court, as above cited, was an act done unexpectedly at the end of the proceeding, when the petitioner no longer had any right to do other than file his petition for rehearing, within the time allowed by the laws of Illinois, and claim that the decision of the Supreme Court of Illinois violated his constitutional rights as an American citizen under the due process of law clause of the Fourteenth Amendment of the Federal Constitution, and was a denial of the equal protection of the laws as guaranteed by the said Fourteenth Amendment of the Federal Constitution (Section 1, Fourteenth Amendment, Federal Constitution). He claims that his rights, privileges, and immunities as an American citizen under the Federal Constitution had been violated by the action of the Supreme Court of Illinois. This was the first opportunity of the petitioner to raise the federal question and the question was timely made, *Sanders* v. *Shaw*, 244 U. S. 317, 320; *Missouri* v. *Gehner*, 281 U. S. 313, 320; *Schlemmer* v. *Buffalo, Rochester, and Pittsburgh Railway Co.*, 205 U. S. 1.

Where in this court a party asserts that the final judgment of the highest court of a state denied him a right or immunity set up and claimed under the Constitution or laws of the United States and this court finds that a federal question involving such claim was properly raised in

the court below, jurisdiction of this court can not be defeated by the mere failure or refusal of the highest court of the state to refer to the question so raised, *Erie R. R. Company* v. *Purdy*, 185 U. S. 148, and a denial of the petition for rehearing in which the petitioner claimed that the decision of the Supreme Court of Illinois denied him certain rights, privileges, and immunities guaranteed by the Fourteenth Amendment of the Federal Constitution, this court has jurisdiction to consider the case on petition for certiorari (R. pp. 44-48).

The petitioner claimed a right under the Fourteenth Amendment of the Federal Constitution in his petition for rehearing, *i. e.*, the right from arrest of his person, and search and seizure of his property on bare suspicion. A construction of the Constitution sustaining the opposite view claimed by the petitioner raised a federal question. *Cohens* v. *Virginia*, 6 Wheat 264, 379; *Osborn* v. *Bank of United States*, 9 Wheat 738, 822; *Patton* v. *Brady*, 184 U.S. 608, 611; *Macon Grocery Company* v. *Atlantic Coast Line R.R. Company*, 215 U.S. 501, 506.

While it is conceded that this court can not enter upon an inquiry as to whether the finding of a state court is against the evidence, *Missouri, Kansas, and Texas R.R. Company* v. *Haber*, 169 U.S. 639, nevertheless, the question as to the sufficiency, competency, or legal effect of the evidence has bearing upon a question of Federal law raised in the proceedings in the state court to support the conclusion reached by the state court may be reviewed by this court, as a supreme court of error of a State may review the proceedings of inferior courts of original jurisdiction. *Makey* v. *Dillon*, 4 How. 447; *Dower* v. *Richards*, 151 U.S. 658. The evidence of the police officer who made the unlawful search of the automobile trunk of the petitioner and after finding contraband goods immediately made the arrest of the petitioner without warrant or without probable cause, clearly shows that the search and

seizure of the goods from the petitioner's automobile trunk and the subsequent arrest of the petitioner was made on *bare suspicion* (R. p. 8). This testimony being uncontradicted shows that the petitioner's constitutional rights as guaranteed by the Fourteenth Amendment of the Federal Constitution were ruthlessly violated and the total absence of probable cause may be considered by this court on certiorari.

The conflict in the decision of the Supreme Court of Illinois in the case at bar with its previous decisions and the decisions of this Honorable Court will seriously affect the uniformity and the administration of settled rules of construction in other cases relative to the constitutional rights of an American citizen under the Fourteenth Amendment of the Federal Constitution.

This Honorable Court should exercise its jurisdiction in this case not merely to determine whether there was an improper application of controlling leading principles, but for the purpose of pronouncing the legal principles which should be applied when a citizen of the United States has been deprived of his liberty and property by an illegal search made on bare suspicion, and an illegal arrest made on bare suspicion as is shown by the undisputed evidence of the arresting police officer in the case at bar (Abs. 8).

C.

The Questions Presented.

1. Whether the federal constitutional rights of due process of law and the equal protection of the laws as guaranteed by the Fourteenth Amendment of the Federal Constitution are violated where it appears that police officers, without a warrant, without probable cause, and without the consent of a citizen of the United States, stops an automobile belonging to the citizen which was being

driven by another person, on bare suspicion makes a search of the automobile after having searched the person of the citizen, taking from the person of the citizen his keys, unlocking an automobile trunk attached to the citizen's automobile, searching said trunk without warrant and without consent, finding in said trunk goods which later turned out to be contraband goods, arresting the citizen without warrant and on bare suspicion, using the said alleged contraband goods as the basis of a criminal prosecution against the citizen from whose possession the same were taken, a denial of a timely motion to suppress the evidence in the trial court and an affirmance of such denial is made in the Supreme Court of the State and evidence secured by the unlawful search is used in evidence on the trial of the case.

2. Whether a citizen of the United States whose constitutional rights have been violated, as related in Paragraph One, who relies upon the long unbroken line of decisions of the state court and the applicable decisions of the Supreme Court of the United States which have held that an arrest on bare suspicion is illegal and that if contraband goods are found as a result of an illegal search and seizure, that the due process of law clauses of the State and Federal Constitution having been violated a timely motion to suppress should be sustained, has a right to apply to this court for a protection of his federal constitutional rights after he has claimed the benefit of the Fourteenth Amendment in the highest court of the State.

3. Where the uncontradicted evidence of the arresting officer (R. p. 8) given on a hearing upon a petition and motion to suppress evidence illegally seized after an illegal search of the automobile of a citizen, as related above in Paragraph One herein, shows that the citizen was not driving or operating the automobile; that the automobile in which the citizen was riding was not speeding; that the

citizen was not violating any law; that the person of the citizen was searched and keys belonging to the citizen were taken without warrant and without consent of the citizen; that it was necessary to unlock the automobile trunk, search the same before any alleged contraband goods were found in said trunk; that the automobile was stopped on suspicion and that the automobile and the citizen was searched on bare suspicion, is the searching of the automobile and arrest of the citizen on bare suspicion a violation of his constitutional rights and repugnant to the provisions of the Fourteenth Amendment to the Constitution of the United States, providing that no state shall deprive any person of his life, liberty or property without due process of law, and that all persons shall be accorded the equal protection of the laws.

4. Where a defendant whose arrest has been made under the circumstances related above in Paragraph One, the trunk of the automobile searched as above related and the applicable decisions of the highest court of a state having held that such search and seizure without warrant and without consent and such arrest, both on bare suspicion, was illegal and when called upon to pass upon the same question the highest court of a state holds to the contrary, and the defendant having raised the question in the trial court and in the highest court of a state that his constitutional rights of due process of law had been violated; and after a surprisingly adverse decision conflicting with all previous decisions of the highest court of a state; and the defendant on petition for rehearing claims rights and immunities under the Fourteenth Amendment of the Constitution and the due process of law clauses thereunder, is the raising of such Federal Constitutional question in apt time, and is the citizen entitled to relief from this court?

D.

Reasons Relied on for the Allowance of the Writ.

The decision of the Supreme Court of Illinois holding that the search of the automobile on bare suspicion without warrant and without the consent of the owner and the arrest of the owner on bare suspicion after having found alleged contraband goods as a result of the illegal search did not violate the constitutional rights of the defendant and that the motion to suppress aptly made, was properly denied, conflicts with the prior decisions of the Supreme Court of Illinois and with the well settled decisions of this Honorable Court. There should be uniformity in the rule of law adhered to by this Honorable Court, that such search and arrest on bare suspicion as the uncontradicted evidence in the case at bar shows, violates the constitutional rights of a citizen of the United States as guaranteed by the Fourteenth Amendment of the Federal Constitution and denies to him the due process of law and the equal protection of the laws as guaranteed by the Fourteenth Amendment of the Federal Constitution.

Vicarious construction of the Fourteenth Amendment of the Federal Constitution should not be permitted to create unnecessary risks or uncertainties in relation to the rights guaranteed by the Fourteenth Amendment. The facts are undisputed relative to the illegal search of the automobile of the petitioner and his illegal arrest (R. p. 8). The arresting officer specifically states that he had no warrant for the arrest of the petitioner or the search of his automobile; that it was only on bare suspicion that the search and arrest was made; that the defendant nor the driver of the automobile were violating any law at the time of the search or arrest and were not suspected of having committed any particular crime.

The problem presented is a matter of the construction of the rights of American citizens under the Fourteenth Amendment of the Federal Constitution while in the jurisdiction of the United States. Such rights should be uniform and this Honorable Court should lay down the doctrine so as to bring about uniformity as to the rights of all American citizens under the Fourteenth Amendment of the Federal Constitution. The matter is of vital importance to all citizens whose federal constitutional rights have been violated by illegal search and seizure of their property and illegal arrest of their persons by police officers acting under color and authority of state laws. A pronouncement by this Honorable Court will clarify the situation so that the rights of all citizens throughout the jurisdiction of the United States under the Fourteenth Amendment will be uniform, both in the state and federal courts. The unbroken line of decisions upholding the right of citizens to be free from arrest on bare suspicion, both in the state courts and in the federal courts can only be preserved by a decision of this Honorable Court. Such an important question should be reviewed by this court on certiorari.

Respectfully submitted,

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Petitioner.

RICHARD E. WESTBROOKS,
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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Report of Opinion.

The opinion of the Supreme Court of Illinois (R. pp. 23-29) is reported in *People* v. *Jack Barg,* 384 Ill. 172, and 51 N. E. (2d) 168.

II.

Statement of Grounds on Which Jurisdiction of this Court Is Invoked.

Jurisdiction of this court is invoked in accordance with the provisions of Sections 237 (b) and 240 (a) of the

Judicial Code, as amended by the Act of February 13, 1925 (28 U.S.C.A. 344, 350) and as more particularly set forth in Part B of the preceding Petition.

III.

Statement of the Case.

A concise statement of the case is made in the Petition preceding under Part A.

IV.

Specification of Assigned Errors Intended To Be Argued.

THE SUPREME COURT OF ILLINOIS ERRED:

1. In holding that the constitutional rights of an American citizen as guaranteed by the Fourteenth Amendment, Section 1 thereof, was not violated where the undisputed facts show that the citizen was riding in his automobile, said automobile being driven and operated by another person; said citizen was not violating any law; that said automobile was not speeding; that police officers on bare suspicion stopped the automobile, searched the defendant taking from his person his keys, opening a trunk of the automobile, searching the trunk of said automobile, finding therein goods which later turned out to be contraband goods; arresting the defendant without warrant or other authority of law having no description of the automobile in which the citizen was riding; no description of the citizen or anyone else in the automobile; having no probable cause for searching the citizen's automobile and arresting the citizen; later procuring an indictment upon the goods taken from the citizen's automobile and on motion made to suppress the evidence so taken from the citizen, the trial court denies the motion to suppress and on review the

arrest and search on bare suspicion being held legal by the highest court of the state, which decision conflicting with the former decisions of the State Supreme Court and of this Honorable Court, the citizen on his petition for rehearing claiming rights and immunities under the Fourteenth Amendment of the Federal Constitution, and the highest court of the state construing the Fourteenth Amendment, Section 1 thereof, of the Federal Constitution against the claim of the citizen.

2. In refusing to hold by its decision and judgment that the search of the petitioner's automobile without warrant and without his consent, and upon bare suspicion, the seizure of the property from the defendant's automobile trunk after unlocking the same with keys taken from the person of the defendant under the circumstances above related; the denial of the motion to suppress as evidence the articles illegally seized from the defendant's automobile trunk as above stated, were illegal and violated the due process of law and the equal protection of the laws and provisions of the Federal Constitution.

3. An American citizen is entitled to the protection of the rights, privileges, and immunities guaranteed by the Fourteenth Amendment of the Federal Constitution by every law enforcing officer and court of every city and state of the United States, and where it appears from the record that these rights have been claimed by the citizen and denied him, such action of the judicial or administrative officers is reviewable by this Honorable Court on petition for certiorari to the court denying the citizen such protection.

4. In reversing the judgment of the trial court and remanding the case to the trial court with directions to enter a proper judgment in each cause instead of reversing the judgment.

V.

ARGUMENT.

A.

The search of the petitioner's automobile and the arrest of the petitioner after the search was on bare suspicion and violated Section 1 of the Fourteenth Amendment of the Federal Constitution, Sections 2, 6, and 10, of Article II of the Illinois Constitution.

The undisputed and uncontradicted testimony of Officer Rosensweig who made the arrest of the petitioner shows that the search of the automobile was made after the person of the defendant had been searched and the keys of the petitioner taken from his person (R. p. 8). Rosensweig was the only officer testifying on the motion to suppress the evidence which was denied. He stated that the defendant was not violating any law at the time the automobile was stopped on suspicion and that the driver and operator of the automobile made his escape. The petitioner, an American citizen and person within the jurisdiction of the United States, was entitled to all rights, privileges, and immunities guaranteed by Section 1 of the Fourteenth Amendment. The Officer plainly states that the automobile was stopped on suspicion; that the defendant's person was searched on suspicion; that the automobile was searched on suspicion. Certainly it is too elemental to admit of extended discussion that such conduct as admitted by the officer violated the constitutional rights of the petitioner.

The Supreme Court of Illinois had heretofore held in a long line of cases that an arrest on bare suspicion was illegal, *People* v. *Brewer*, 355 Ill. 348, 359; *People* v. *Henne-*

man, 373 Ill. 603, 606; *People* v. *Dalpe,* 371 Ill. 607, 614; *People* v. *Ford,* 356 Ill. 572; *People* v. *McGurn,* 341 Ill. 632.

The petitioner as a citizen of the United States had a right to rely upon the previous decisions of the Supreme Court of Illinois. The Supreme Court of Illinois had also held in the above cases that where a search is made without warrant or consent and while the citizen is not violating any law in the presence of officers and there is no probable cause for the officer to believe that the citizen is implicated in a particular crime, and contraband goods are found as the result of the illegal search, but timely motion to suppress such evidence, being made a defendant was entitled to have his motion sustained. It is further held by the above cited cases that the fact that contraband goods may be found as the result of an illegal search, the search can not be made legal by such discovery.

The Supreme Court of Illinois in *People* v. *Dalpe,* 371 Ill. 607, 612, holds that Section 6 of Article II of the State Constitution and the Fourteenth Amendment of the Federal Constitution were identical in the protection of citizens from illegal search and seizure and states (p. 612):

> "If property, private documents and the like, can be seized, held and used in evidence against a citizen without compliance with the constitutional safeguards, such safeguards are of no value and may as well be stricken from the constitution. However, praiseworthy may be the efforts of officers to bring guilty persons to punishment, they are not to be aided by the sacrifice of any one of the Bill of Rights, for in such a case the officer becomes a law breaker, and the fact that, in many instances, he is beyond the reach of the citizen to punish, makes his actions all the more reprehensible. These sections of the State and Federal constitutions were intended to secure the citizen in person and property against unlawful invasion of the sanctity of his home by officers acting under legislative or judicial sanction. *The protection of those sections extends equally against the action of all officers*

of the law, and when courts sanction proceedings of that sort they are guilty of manifest neglect even of open defiance of prohibition of the constitution intended to protect the people against unauthorized and high-handed action of government agents.'' (Emphasis ours.)

The court cites decisions of this Honorable Court as authority among them, *Weeks* v. *U.S.*, 232 U.S. 383; *Adams* v. *New York*, 192 U.S. 585; *Gouled* v. *U.S.*, 255 U.S. 298; *Amos* v. *U.S.*, 255 U.S. 313.

This case does not involve the weight of the evidence concerning the illegal search and arrest because the undisputed testimony of the officer who made the arrest clearly shows a total absence of probable cause and also expressly shows that the search and seizure was made on bare suspicion; that the arrest of the petitioner was on bare suspicion.

The case of *People* v. *Dalpe*, 371 Ill. 607, contains an exhaustive statement of the law of the State of Illinois and of the United States, and holds that an unlawful search can not be justified by what is found in the search, but if the search be unlawful in the beginning it is not made lawful by the discovery of certain contraband articles. This statement of the law is supported by cited decisions of the State of Illinois and of this Honorable Court.

It must be admitted that no facts appear justifying the arrest and search of the petitioner. He had not been identified or suspected as participating in any particular crime and particularly the crime of tampering with an automobile. The arresting officer had no description or other information tending to justify his suspicion that he was implicated in any particular crime. It can not be said that anything was known to the officers or suspected by them reasonably to indicate that a man, answering the description of any of the men alleged to have been tamper-

ing with an automobile in Hamilton Avenue and the petitioner was so well under the influence of intoxicating liquor that he fell out of the automobile on the ground when the door of the automobile was opened. There is no evidence that he was able to arise after the fall or whether the officers were compelled to pick him up from the ground. *People* v. *Henneman*, 373 Ill. 603, 606. It is contended that every arrest on bare suspicion is unlawful.

In *People* v. *De Luca*, 343 Ill. 269, the Supreme Court of Illinois in reversing a conviction because a motion to suppress had been denied recited in its opinion the fact that the officer had observed feathers sticking out of the pockets of the defendant and had been informed that someone on the train had violated the game laws prohibiting the possession of a hen pheasant at a time when such possession was a criminal offense. The officers searched the defendant after which it was discovered that the defendant had in his possession a hen pheasant. The court held that such search was illegal and that all evidence secured by such illegal search should be suppressed. At page 271 the court states:

> "* * * Where there is no probable cause and the person is searched without a warrant in an effort to discover evidence, and an arrest is afterwards made solely on the strength of the discovery, the evidence thus obtained is violative of his constitutional rights and should be suppressed, on motion duly made for that purpose (Citing cases).
>
> "The inherent right of all citizens to immunity from unreasonable search and seizure is guaranteed by both state and federal constitutions. This right was violated by an unlawful search of the defendant without a warrant and before his arrest. The criminal court erred in denying defendant's petition to suppress the evidence, etc."

In the case at bar nothing could be seen in the locked trunk until after the officers had unlawfully taken from

the person of the petitioner his keys and unlocked the trunk. After unlocking the trunk and searching the same goods were found which later turned out to be contraband. The petitioner was not arrested until after this illegal search of his automobile and his person. Certainly the petitioner had a right to rely upon the previous applicable decisions of the Supreme Court of Illinois and of this Honorable Court.

In the case at bar if this decision is allowed to stand, the rights of all American citizens will be in jeopardy as officers will search on bare suspicion, arrest on bare suspicion, and the constitutional guarantee will be considered for naught.

The rights of the petitioner under the Fourteenth Amendment were ruthlessly violated. He claimed a violation of his constitutional rights in the highest court of the state and has no other remedy except to appeal to this Honorable Court to protect his federal constitutional rights as an American citizen as guaranteed by Section 1 of the Fourteenth Amendment.

B.

The Supreme Court of Illinois erred in refusing to follow the applicable decisions of this Honorable Court relative to the rights of the petitioner under Section 1 of the Fourteenth Amendment.

An American citizen is entitled under Section 1 of the Fourteenth Amendment to the rights and immunities guaranteed thereunder. The right to freedom from arrest on bare suspicion is one of the rights guaranteed under the Fourteenth Amendment. The right to have his property free from a search on bare suspicion is a right guaranteed by the Fourteenth Amendment. The right to have his person free from search on bare suspicion by police

officers is a right guaranteed by the Fourteenth Amendment. The undisputed evidence in the case at bar of Police Officer Rosensweig on the motion to suppress the evidence (R. p. 8) clearly shows that these federal constitutional rights of the petitioner were violated by the illegal search of the person and automobile trunk of the petitioner and his subsequent arrest. All of such actions were without warrant or authority of law and while the petitioner was not violating any law, but solely on bare suspicion as testified to by the officer.

The rights of a citizen guaranteed by the Fourteenth Amendment of the Federal Constitution can only be protected by this Honorable Court granting the petition for certiorari and again stating the law applicable to such illegal and unlawful arrest of a citizen and search and seizure as shown by the undisputed evidence in the case at bar.

C.

When the Cause Is Remanded With Directions.

In *Wilson* v. *Fisher*, 369 Ill. see 538, at page 541, the Court said:

> "Where a cause is remanded by the Appellate Court with specific directions to the Circuit Court to enter a particular order or decree, that court has no discretion in the matter, but has a positive duty to enter the order or decree in accordance with the directions. When the mandate of an Appellate Court directs the entry of a decree, the lower court must conform its actions to the directions given in the mandate and must enter a decree in accord with such mandate.
>
> Citing: *People* v. *DeYoung*, 298 Ill. 380; *Fisher* v. *Burks*, 285 id. 290; *Prentice* v. *Crane*, 240 id. 250.

"In *People* v. *Scanlan*, 294 Ill. 64, we said: 'It is the duty of the lower court to follow and obey the mandate of a court of review which gives specific directions for the entry of an order or decree. It is the mandate that governs and not the opinion, and where the mandate gives precise and unambiguous directions they must be obeyed.' The duty to enter a decree in accord with the mandate of the reviewing court may be enforced by mandamus."

Citing: *People* v. *DeYoung*, *supra*: *People* v. *Scanlan*, *supra*.

CONCLUSION.

It is respectfully submitted that the decision of the Supreme Court of Illinois in the instant case in conflicting with the applicable decisions of this Honorable Court and of the long unbroken line of decisions by the Supreme Court of Illinois, if permitted to stand will create much confusion and great uncertainty as to the rights of American citizens under the Fourteenth Amendment of the Federal Constitution, therefore it is respectfully requested that this Honorable Court will grant the petition for a writ of certiorari as prayed for therein.

Respectfully submitted,

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BRIEN MCMAHON,
WALTER E. GALLAGHER,
Counsel for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1943

No. 774

JACK BARG,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

ANSWER OF THE PEOPLE OF THE STATE OF ILLINOIS OBJECTING TO THE ISSUANCE OF A WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

GEORGE F. BARRETT,
Attorney General of the State of Illinois

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IN THE

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OCTOBER TERM, A. D. 1943

No. 774

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THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

ANSWER OF THE PEOPLE OF THE STATE OF ILLINOIS OBJECTING TO THE ISSUANCE OF A WRIT OF CERTIORARI.

To the Honorable, the Supreme Court of the United States:

The People of the State of Illinois object to the issuance of a Writ of Certiorari in the above cause for the following reasons:

I. Petitioner's claim of a federal constitutional right was not asserted in the trial court nor was it raised by assignment of error or in the briefs in the Supreme Court of Illinois. It was suggested for the first time, without argument, in a petition for rehearing. Federal appellate jurisprudence requires that a federal question arising in state courts be asserted in conformity with the rules of state practice unless those rules themselves are unconstitutional. Having neither observed the applicable Illinois Rules nor challenged the federal constitution-

ality of those rules, the defendant has waived any federal question which might have arisen upon the record in the instant case.

II. Even if the record disclosed that the evidence in question was obtained by an unlawful search and seizure, conviction in a **state** court upon such evidence does not violate any **federal** constitutional right.

III. Although the question of the legality of the search and seizure is not properly before this court, nevertheless the record shows that search and seizure is entirely lawful because it was incidental to an arrest for an offense committed in the presence of the arresting officers.

BRIEF IN SUPPORT OF THE FOREGOING ANSWER.

The points made in this brief are set forth without argument, in the form of propositions, in the foregoing answer. Respondent accordingly adopts those propositions as its preliminary summary of the following argument.

I.

If any question of the federal constitutional rights of the petitioner could have been raised on the record, such question was waived (1) by failure to raise it in the trial court and (2) by failure to raise it in the Supreme Court prior to petition for rehearing.

The question of the constitutional rights of petitioner was not raised in the trial court. An examination of the record at page 21 shows no motion whatever for a finding on constitutional grounds. This was necessary under the laws of the State of Illinois.

People v. *Esposito*, 296 Ill. 535.
People v. *Pierce*, 296 Ill. 327.

The only exception to this rule occurs where the law under which a defendant is convicted is void or unconstitutional. This situation does not arise in the instant case.

Again, at pages 21 and 22 of the record, petitioner's assignment of errors in the Supreme Court is set forth. There are thirteen of them, but not one of them raises any constitutional question. They have to do with admission and rejection of evidence with the sufficiency of the evidence. Assignment 10 sets out that there is no such law as larceny of an automobile tire in the State of Illinois; whereas Chapter 38, Section 397-A, Illinois Revised Statutes provide that the stealing of a motor vehicle tire, regardless of the value thereof, is punishment by imprisonment in the penitentiary. It is shown later that this statement is an inadvertence of counsel. The law is cited and discussed hereafter.

Petitioner in the Supreme Court of Illinois, after his conviction, filed a lengthy petition for a re-hearing, record 32 to 48, in which for the first time the constitutional question was raised. Not having raised it in the briefs originally filed, petitioner was not in a position after the decision of the Supreme Court to raise new questions on petition for re-hearing. All points on which petitioner desired rehearing must have been raised in the briefs.

People v. *Snyder*, 279 Ill. 435.

II.

Reception in a state court of evidence which has been illegally obtained violates no federal constitutional right of the accused.

The petitioner assumes, without either authority or argument in support of his assumption, the proposition that *if* the evidence in question had been obtained by an unlawful

search and seizure a confiscation based upon such evidence would violate some *federal* right of the accused. This proposition, which must necessarily be the initial premise of petitioner's argument, is completely untenable.

Of course, petitioner does not suggest that the sixth amendment to the Federal Constitution, which prohibits unreasonable search and seizure, is applicable to the states, because the contrary is too well settled.

> *Ohio* v. *Dollison*, 194 U. S. 477;
> *Brown* v. *New Jersey*, 175 U. S. 174;
> *Spies* v. *Illinois*, 123 U. S. 131.

Petitioner does, however, invoke the fourteenth amendment in support of his contention. But it is a first canon of the construction of that amendment that, unlike the specific guaranties confirmed as against the Federal government by the Bill of Rights, the due process clause protects only those rights which are **recognized by the almost universal consensus as being of the very essence of fairness and justice**. This court has many times held that, for example, neither the right to trial by a jury of twelve nor, at least as deriving from a universally applicable precept (even the right to counsel is guaranteed in State courts by the Fourteenth Amendment, even where such rights would exist in the Federal courts by virtue of the Bill of Rights. On the other hand, such fundamental rights as the opportunity to be heard before some tribunal before condemnation or of course the right to an impartial investigation of the facts, cannot be denied without violation of the due process clause.

Evidence which conclusively proves or at least which would fairly support a conviction is none the less probative because it has been illegally seized. Evidence thus seized is as **relevant** as though it had been obtained by lawful means.

The only question, then, is whether the fact of illegal seizure has so universally condemned its admission that a *federal* right may be claimed when such evidence is admitted in a *State* court?

Once it is perceived that the test is general consensus, relator's argument is seen to have no foundation. Since the question is not one of federal jurisprudence but is merely to whether there is such universality or at least such overwhelming preponderance of opinion that the decision of the Supreme Court of Illinois must be said to offend the first principles of fair play, it would appear that, to determine such a question of consensus, resort to text commentary might be even more persuasive than the consideration of comparatively few particular cases.

In Corpus Juris Secundum, Title *Criminal Law*, section 657, volume 22, page 1006, the following statement is made:

> "**In the majority of jurisdictions evidence is competent against the accused although it has been obtained by an illegal search and seizure.**
>
> "In the absence of a provision in the organic or statutory law expressly rendering the evidence inadmissible, the rule in the majority of jurisdictions is that evidence obtained by an unlawful search and seizure in violation of constitutional or statutory provisions, see the C. J. S. title Searches and Seizures § 1 *et seq.* also 56 C. J. p. 1154 note 2 *et seq.* is nevertheless admissible. This is the rule in some jurisdictions where formerly such evidence was incompetent against accused."

Literally hundreds of cases are cited in support of the text. Such great states as New York (*People* v. *DeVore*, 150 N. E. 585, 242 N. Y. 13), California (*People* v. *LeDoux*, 102 Pac. 517, 157 Cal. 537), Massachusettes (*Commonwealth* v. *Kozlowsky*, 138 N. E. 14, 243 Mass. 538), as well as most of the other states, adhere to this rule.

It is true that Illinois and the Federal courts enforce the minority view, which view makes the admissibility of physical evidence depend in part upon the history of the acquisition of that evidence. But the foregoing authorities are sufficient to show that the Illinois rule, even though it coincides with the Federal rule, embodies no general principle of due process of law. For these reasons, it is evident that, even if we grant, for the sake of argument, that the evidence in question was illegally seized, its admission did not violate the fourteenth amendment.

III.

Even if the question of lawful search were before this court as though it were a Federal question, the judgment should be affirmed because the search was clearly lawful.

Petitioner discusses at some length the evidence at his trial in the criminal court of Cook County. He contends that the tires in question should not have been allowed in evidence because they were illegally taken from his automobile after an illegal arrest. Aside from the fact that no objection was made upon any ground asserting a right under the Federal constitution, nor was the Federal constitution involved by assignment of error in the Supreme Court of Illinois, the evidence does not support this contention of petitioner. Petitioner admits that he was out around 3:00 o'clock in the morning driving with another man. The officers who arrested him stated that they followed his car and arrested him because his car had no lights on it.

We think that any court would take judicial notice of the fact that 3:00 o'clock A. M. in the latitude of Chicago is night and before sunrise. The Statutes of Illinois provide that from the period of sunset to sunrise a motor vehicle should have two white lights in front and a red light on the rear, and provides that it shall be a misdemeanor to violate this provision of the Motor Vehicle Act; and the

Motor Vehicle Act provides that a person so convicted shall be fined not less than $1.00 nor more than $100.00 (Section 200 and section 234, chapter 95½, Illinois Revised Statutes 1943). Thus, from the undisputed evidence in the record, it may be seen that the petitioner was violating the laws of Illinois in the presence of the police officers. Under the Illinois Statute, the officers had a right to arrest him, and having arrested him, had a right to search him.

See also

People v. *Swift*, 319 Ill. 359.
U. S. v. *Chin On*, 297 Fed. 531.
Hughes v. *The State*, 145 Tenn. 544, 238 S. W. 588, (Point 5).

This arrest was legal because the officers found petitioner violating the statute, and as we have said above, it follows that they had a right to search. In searching the automobile, they found certain tires that had been stolen from one Edward F. Gaenzle, the prosecuting witness. Petitioner's car had been seen in the neighborhood of the Gaenzle car and the wife of complaining witness had seen two men descend from petitioner's car and take therefrom the tires and golf clubs which were afterwards recovered by the police. (Rec. 12) (Rec. 13).

We might add here that the police had been warned from their headquarters that this offense had been committed and to be on the lookout for the offenders.

If petitioner were in a position to raise the question in his petition as to his constitutional rights and infringement thereof, on the record that he presents he would not be entitled to any relief. The prohibition against search and seizure is not against all searches, but against unreasonable searches.

People v. *Marvin*, 358 Ill. 426.
People v. *Kissane*, 347 Ill. 385.
People v. *Exum*, 382 Ill. 204.

Petitioner has cited a long list of cases on the question of infringement of constitutional rights but these cases can be clearly distinguished from the case where an officer arrests because he sees an offense committed or has reasonable grounds to believe such an offense was committed. Petitioner here is entirely wrong when he makes the contention and repeats it that he was arrested on bare suspicion. The officer did use the expression "suspicion" but he also gave a concrete reason for that suspicion which was a violation of the Illinois Statutes in respect to having lights on an automobile.

Petitioner says he was not violating any laws of the City or the State, record 6 and 7. It is evident from the record that his counsel took the same position in respect to the lights, not being familiar with the statute thereon, just as there appeared to be lack of familiarity with the statute on the subject of larceny of automobile tires. Counsel representing petitioner here did not represent him in the trial court.

We might add that it is evident from the opinion of the Supreme Court of Illinois why this cause was reversed and remanded with directions to the trial court to enter the proper judgment. Petitioner had been convicted as an habitual criminal, which conviction carried a much heavier punishment than did the ordinary offense of larceny; but stealing an automobile tire under the Statute was not one of the offenses mentioned in the habitual criminal act; hence under the evidence, the petitioner being clearly guilty should have been sentenced for the single offense of stealing automobile tires.

In conclusion we call the court's attention to the fact that the petitioner, on one hand, claimed he was not so drunk that he did not know what was going on and that Levine, the man who was with him, had the keys, yet, on the other hand, he claims that the keys were taken from

him, petitioner, and that he protested against the officers arresting him and taking the car. It seems clear from the record that he could not have been drunk as he remembered everything favorable to himself that occurred on the night of the larceny.

For the reasons above given, it is respectfully submitted that the petition for a writ of certiorari should be denied.

GEORGE F. BARRETT,
Attorney General of the State of Illinois

THOMAS J. COURTNEY,
State's Attorney of Cook County, Illinois,
Counsel for Respondent.

(23)

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, A. D. 1943

No. 774

JACK BAEG,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

REPLY OF JACK BAEG, PETITIONER, TO THE ANSWER OF THE PEOPLE OF THE STATE OF ILLINOIS OBJECTING TO THE ISSUANCE OF A WRIT OF CERTIORARI, AND BRIEF IN SUPPORT THEREOF.

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IN THE

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REPLY OF JACK BARG, PETITIONER, TO THE ANSWER OF THE PEOPLE OF THE STATE OF ILLINOIS OBJECTING TO THE ISSUANCE OF A WRIT OF CERTIORARI, AND BRIEF IN SUPPORT THEREOF.

To the Honorable, the Supreme Court of the United States:

I.

Reasons for filing reply to the Answer of the People of the State of Illinois.

We have carefully considered the Answer of the People of the State of Illinois, Respondent, objecting to the issuance of a Writ of Certiorari and its Brief in support thereof, and find that the Answer and Brief raised a host of minor controversies of mere details but we have been un-

able to find in either, Answer or Brief, answers to the propositions of law tendered by the petition and brief for the petitioner. These details we shall not attempt to meet, lest a particularized rebuttal by the petitioner, obscure the essential simplicity of the issues presented to this court for decision. We expressly desire to note that we do not concede that respondent is correct on the issues which are not developed in reply. Instead, we shall briefly call to the attention of this Honorable Court such matters which we believe sufficient to close the pleadings.

II.

The first contention of the respondent, that petitioner's claim of a federal constitutional right was not asserted in the trial or Supreme Court but was first suggested in the petition for re-hearing, is untenable. The reason given for this assertion by the respondent is that the rules of state practice require state constitutional questions to be raised in the trial court. Two cases are cited in support of this proposition by the respondent, *People* v. *Esposito*, 296 Ill. 535; 129 N.E. 846, and *People* v. *Pierce*, 296 Ill. 327; 129 N.E. 764. These cases do support the contention of the respondent that the unconstitutionality of a state law must be raised in the trial court but astute counsel overlooked the fact that these cases were decided in 1921 by the Supreme Court of Illinois, and that in 1929 the doctrine was overruled in *People* v. *Borgeson*, 335 Ill. 136-144 and *People* v. *Clardy*, 334 Ill. 160-163. The *Pierce* and *Esposito* cases were specifically referred to by the Supreme Court in *People* v. *Borgeson* (p. 144) where the court states:

> "This court rendered a decision at the February term, 1929, in *People* v. *Clardy*, 334 Ill. 160, to the effect that where the defendant is sentenced under the provisions of a void or unconstitutional act or under an indictment that did not state an offense under our

law, he was entitled to prosecute a writ of error to have that judgment reviewed, and that this court would have jurisdiction of the case under an assignment of error that the act under which he was sentenced was unconstitutional. If the act under which defendant was punished in this case was unconstitutional or void there was no authority whatever conferred on the court to enter a judgment and sentence against him, even on a plea of guilty, **and defendant had the right to prosecute his writ of error to this court although the question of the constitutionality of the act was not presented to the lower court.**" (Emphasis ours.)

We will not state that counsel for the respondent is unfamiliar with the decisions of the State of Illinois, but that, in citing cases which have been later overruled by the Supreme Court, he neglected to refer to his citator.

It further appears that the respondent has overlooked the cases cited by the petitioner in his petition (p. 7) which hold that a federal question may arise in the highest court of the state by the total disregard of the well settled rights of a citizen, although no mention was made of the same in the trial court.

The Supreme Court of Illinois in *Gillespie* v. *People*, 188 Ill. 176, 182-183, 58 N.E. 1007, 1009—52 L.R.A. 283, 80 Am. St. Rep. 176, in construing the Bill of Rights of the State of Illinois (p. 182) Sec. 1 and 2 of Art. 2 and Sec. 22 of Art. 4 of the State Constitution, compares the terms, "life", "liberty" and "property", with the same terms as used in Sec. 1 of the Fourteenth Amendment of the Federal Constitution and states (pp. 182-183):

"The terms 'life', 'liberty' and 'property', are representative terms, and intended to cover *every right*, to which a member of the body politic is entitled under the law.

> These terms include the right of self-defense, freedom of speech, religious and political freedom, exemptions from **arbitrary arrests**, the right freely to buy and sell as others may. Indeed they may embrace all our liberties, personal, civil and political, including the rights to labor, to contract, to terminate contracts, and to acquire property. **None of these liberties and rights can be taken away except by due process of law.** (2 Story on Const.—5th Ed.—Sec. 1950.)" (Emphasis ours.)

Although we do not believe it necessary to extend argument on this point, we feel it fitting and proper to state that if the Assignment of Errors Nos. 1 and 6 (Rec. 21) are meritorious, then a state and federal question were raised by the facts alleged therein, and rights claimed under the Fourteenth Amendment of the Federal Constitution and the Bill of Rights of the Illinois Constitution were drawn into question and decided adversely to the petitioner. The bare assertion that his constitutional rights were violated without stating acts and facts would have been without avail. *Virginia* v. *Rives*, 100 U.S. 313, 323, 25 L. Ed. 667.

Double Citizenship.

The petitioner, being a citizen of the United States and of the State of Illinois, owes allegiance to both of these governments, and, within their respective spheres, must be obedient to the laws of each. In return he is entitled to demand protection from each within its own jurisdiction (11 C.J. p. 776, Sub. Sec. 3). The petitioner residing in the State of Illinois, is presumed to be a citizen of the State of Illinois and of the United States (11 C.J. p. 786, par. 21), being a citizen of the State of Illinois he had a right to rely upon the highest court of the state to protect his rights under the State and Federal Constitutions,

and to apply the same law to him as applied to all other citizens under similar circumstances, and when the highest court of the state failed to apply the same principles of law to his case as to all other cases in regard to the arbitrary and illegal search of his person, search of his automobile, and his illegal arrest on suspicion, he then had a right to apply to this Honorable Court as he had been denied the "due process of law" and the "equal protection of the laws."

The question presented in the instant case by the opinion and decision of the Supreme Court of Illinois in holding that the search and arrest of the petitioner, as described in the petition herein, on bare suspicion, is valid, when in all other cases it has held such search and arrest invalid and illegal, is tantamount to hold that one party is entitled to certain rights and benefits of certain modes of procedure, and that another party similarly situated is not entitled to them. If an Act of the State Legislature so held, there is no question that such an Act would be challenged on the ground of unjust discrimination against a citizen of the United States, and denial to him of the equal protection of the laws. *Backus* v. *Fort Street Union Depot Company*, 169 U.S. 557-571, *Chicago, Burlington and Quincy Railroad* v. *Chicago*, 166 U.S. 226, 241, 41 Law Ed. 976, 17 S. Ct. 581, 149 Ill. 547, 37 N.E. 78.

In *Virginia* v. *Rives*, 100 U.S. 313, this Honorable Court has expressly stated (p. 322):

> "Denials of equal rights in an action of the Judicial Tribunal of the state are left to the revisory powers of this court."

The petition to suppress was not answered and the facts as stated must be taken as admitted. The testimony of the Police Officer on the hearing of the Motion to Suppress, that the search of the person of the petitioner, resulted in

the taking of a key belonging to the petitioner, the unlocking of the trunk on the rear of the automobile of the petitioner, the searching of the trunk, after the same had been unlocked; the finding of goods in the trunk, which later were found to be contraband, and the arrest of the petitioner, all were on *bare suspicion*, without warrant or process of law, is not denied and therefore must stand admitted.

The highest court of the state in all other similar cases having held such search and arrest to be illegal and violative of the "due process of law" clause of the Constitution, in failing to so hold in this case is a plain denial of the equal protection of the laws and the due process of law, clauses of Section 1, of the Fourteenth Amendment of the Federal Constitution as well as the due process of law, clause of the State Constitution. An American citizen has a right to apply for relief to this court for a violation of the constitutional provisions made by the Judicial Tribunal of the state. Such violations generally arise after a citizen has exhausted his remedies in the highest courts of the state, as was done by the petitioner in the case at bar.

This Court in *Virginia* v. *Rives*, 100 U.S. 313, 319, states:

> "By the violation of the constitutional provisions, when made by the Judicial Tribunal of a state, may be and generally will be, after the trial has commenced, it is then, *during or after* trial, that denials of a defendant's right by Judicial Tribunal occur. Not often until then. *Nor can the defendant know until then* that the equal protection of the laws will not be extended to him. Certainly until then he cannot affirm that it is denied, or that he cannot enforce it, in the Judicial Tribunals.
>
> "It is obvious, therefore, that to such a case—that is, a judicial infraction of the constitutional inhibitions, after trial or final hearing has commenced,—

> Sec. 641, has no applicability, and was not intended to reach such cases. **It left them to the revisory power of the higher courts of the state and ultimately to the review of this court.**" (Emphasis ours.)

It is obvious that the petitioner could not know in advance that the highest court of the state would deny to him the due process of law and the equal protection of the laws until its final decision.

The norm of this doctrine is clearly enunciated by Mr. Justice Clifford in a concurring opinion (*Virginia* v. *Rives*, 100 U.S. 334) in which he states:

> "The action of the Judicial Officer in such cases, where the rights of a citizen under the laws of the United States are disregarded, may be reviewed and corrected or reversed by this court."

The case of *People* v. *Snyder*, 279 Ill. 435, 117 N.E. 119, cited by the respondent in its answer (p. 3) is not in point, the petition for rehearing in that case, raised a question of the exclusion of certain impeaching evidence. Such is *not* the case at bar.

III.

Respondent states under point II of its Answer, reception in a state court of evidence which has been *illegally obtained*, violates no federal constitutional right of the accused.

The respondent states that the Sixth Amendment to the Constitution which prohibits unreasonable search and seizures is not suggested by the petitioner. Again the astute counsel is in error as the Fourth Amendment of the Federal Constitution prohibits unreasonable searches and seizures.

Respondent then undertakes to show that in jurisdictions **other** than the State of Illinois and the Federal Courts, evidence *illegally* obtained is competent against the accused. The case at bar is from the State of Illinois, and it is admitted by the respondent that evidence illegally obtained, under the constitution of the State of Illinois **is not competent or admissible against the accused, in a criminal case,** when timely application is made to suppress the same. The undisputed evidence of the arresting officer shows that the evidence complained against was illegally seized (Rec. 8); it further shows that timely objection was made before trial by petition and motion to suppress (Rec. 5, 6).

The cases cited in the petition for Writ of Certiorari, in the instant case, (P. 6) clearly show that in all other cases of a similar nature the highest court of the state of Illinois has held, that a denial of a motion to suppress evidence illegally obtained when timely made, is a denial to the defendant of due process of law and the equal protection of the laws.

In a recent case decided by the highest court of Illinois, *People* v. *Martin*, 382 Ill. 192, the court again sustained the norm and held that a denial of a timely made motion and petition to suppress evidence illegally obtained, violated the state constitutional provisions in Art. 2, Section 6 and the Fourth Amendment of the Federal Constitution as the provisions of both constitutions by construction had the same effect and followed the decisions of this Honorable Court in holding that evidence illegally obtained cannot be used against an accused if a motion to suppress is timely made. The court quotes from *People* v. *Castree*, 311 Ill. 392 and states (P. 197):

> "In the case of evidence obtained by unlawful search and seizure, the same *may not be used* in the trial of the cause if a motion is made in apt time to suppress the evidence and return it to the defendant."

"In that case substantially all of the authorities are reviewed or commented upon, and while conceding there are some jurisdictions in which a different rule prevails, **the one above is definitely adopted by the court,** and adhered in subsequent cases where the same or similar questions were involved.

"The similarity of the provisions of the constitution of the United States with that of Illinois, makes an examination of the decisions of the United States Courts of particular interest." (Emphasis ours.)

Without regard to the rule adhered to in other jurisdictions the applicable Illinois rules of law and procedure must prevail.

This contention of the petitioner is so obvious that we will not labor the point.

IV.

The respondent states, even if the question of lawful search *were* before this Court as though, it *were* a Federal question, the judgment should be affirmed because the search was clearly lawful.

It should be borne in mind that the Petitioner was compelled to rely upon the highest Court of the State to protect his constitutional rights after the same had been disregarded by the trial court. He could not anticipate a disregard of his constitutional rights by the highest Court of the State until final judgment had been rendered on his petition for rehearing. *Virginia* v. *Rives,* 100 U. S. 313, 319.

In his petition for rehearing (Rec. 44) he calls to the attention of the Supreme Court of Illinois, the disregard of his rights under Sections 6 and 10, Article 2, of the Illinois Constitution and the Fourth Amendment of the

Federal Constitution. He also insisted that the holding of the Supreme Court of Illinois in its opinion in the instant case was contrary to the holding in other cases of a similar nature and was an unjust discrimination in the trial procedure, in the instant case, against the constitutional guarantees both State and Federal claimed by the Petitioner.

Again, the Petitioner in his petition for rehearing (Rec. 48), claimed that his rights under the Fourteenth Amendment of the Federal Constitution had been violated by the decision of the Court, in the instant case, resulting from a discriminatory withholding from the Petitioner of the application of the well settled principle of Law that, a search and arrest on "*bare suspicion*" of a citizen violated the due process of law and the equal protection of the laws.

This Honorable Court in *Hill* v. *State of Texas*, 316 U. S. 400, 406, in reversing a judgment of the highest Court of the State which had affirmed a judgment of conviction in a criminal case states:

> "But no State is at liberty to impose upon one charged with crime a discrimination in its trial procedure which the Constitution, and an Act of Congress passed pursuant to the Constitution, alike forbid. Nor is this Court at liberty to grant or withhold the benefits of equal protection, which the Constitution commands for all, merely as we may deem the defendant innocent or guilty. *Tumey* v. *Ohio*, 273 U. S. 510, 535. It is the State's function, not ours, to assess the evidence against a defendant. But it is our duty as well as the State's to see to it that throughout the procedure for bringing him to justice he shall enjoy the protection which the Constitution guarantees. Where, as in this case, timely objection has laid bare a discrimination in the selection of grand jurors, the con-

viction cannot stand because the Constitution prohibits the procedure by which it was obtained. *Equal protection of the Laws is something more than an abstract right.* It is a command which the State must respect, the benefits of which every person may demand. Not the least merit of our constitutional system is that its safeguards extend to all—the least deserving, as well as the most virtuous." (Emphasis ours.)

Much argument is devoted by the Respondent to show, although contrary to the undisputed evidence of the arresting officer, Rosensweig (Rec. 8), that the arrest was lawful and that the search of the automobile was incidental thereto. The Motor Vehicle Act (Chap. 95½, Ill. Rev. Stat. 1943, Sections 200-234) is relied upon to support the contention of the Respondent. Section 199, which precedes Section 200, in part is as follows:

"It is unlawful for any person to drive or move or for the owner to *cause* or *knowingly permit* to be driven or moved on any highway any vehicle * * * which is not at all times equipped with such lamps and other equipment in proper condition and adjustment as required in this article, etc., * * *" (Emphasis ours.)

Section 200 requires every motor vehicle to carry two lighted lamps, etc.

The undisputed evidence of the arresting officer is that the driver of the car, escaped, leaving the Petitioner sitting in the car alone (Rec. 8). There is no evidence in the Record appearing from the testimony of the arresting officer or any other witness, that the Petitioner was the *driver* of the car. There is no evidence in the Record and no attempt was made to show that the Petitioner "*caused or knowingly permitted*" the lights to be turned off by Levine, who was driving the automobile. The officer did **not state** in his testimony

(Rec. 8) that the arrest was made because the lights were out but positively states (Rec. 8), "*we stopped the car on suspicion.*" *The stopping of the car and the searching of the defendant and the car was on suspicion that he might be involved in something.* If the arresting officer had made the arrest of the defendant for any other cause than on suspicion it is reasonable to believe that the State would not have refrained from introducing such evidence. Learned counsel for the Respondent attempts to place a cause for the illegal search of the car and the illegal arrest of the Petitioner on a ground which is not supported by the testimony in the Record. I do not believe this Honorable Court will go outside of the undisputed testimony to find facts not shown by the Record (Rec. 8).

We would not extend this Brief and Reply by showing the inapplicability of the cases cited by the Respondent, except for the fact that they are so dissimilar as to warrant a brief analysis.

People v. *Swift*, 319 Ill. 359; 150 N.E. 263, involved a robbery of a Bank in the day time and no motion was made for the suppression as evidence certain money obtained by the officers, until after the trial had begun and the money was not used as evidence in the case (150 N.E. p. 265), the arrest and search were under different circumstances from the search and arrest in the case at bar.

People v. *Marvin*, 358 Ill. 426, 428, the officers had received information concerning a particular car bearing a license issued to a fictitious person. An investigation had been made, the officers had seen the automobile and the fictitious license and a month later, upon seeing the same car further investigation disclosed stolen goods in the car which were in plain view of the officers. The Court in defining a search states (p. 428):

> "A search implies a prying into hidden places for that which is concealed, and it is not a search to ob-

serve that which is open to view. A search implies an invasion and quest with some sort of force, either actual or constructive. (*Combest* v. *State*, 239 Pac. (Okla.) 936; *State* v. *Hilton*, 249 id. 1103, 110 Ore. 441.)"

In the instant case the undisputed testimony of the arresting officer (Rec. 8) clearly shows a search was made before the arrest. Both the search of the person and automobile of the Petitioner and his arrest thereafter were without legal authority as the officer has clearly stated that the searching and arresting were "*on suspicion that he might be involved in something.*"

In *People* v. *Kissane*, 347 Ill. 385, 388, a conviction for carrying concealed weapons, the arresting officer had received a description of the man who had held up the Bank two days before; the description tallied with the description of the defendant; the officer had arrested the defendant on previous occasions and knew the similarity of the description of the defendant with the alleged robber. Upon arrest of the defendant for the specific crime of the robbery of the Bank, a search followed resulting in the finding of a revolver concealed on the person of the defendant. No rebuttal evidence was given on the motion to suppress. The point raised was that the testimony of the officer was unworthy of belief. In the case at bar the testimony of the arresting officer which is undisputed clearly shows the illegality of the search and the arrest. The Respondent in its Answer (p. 8) states that the cases cited by the Petitioner on the question of infringement of constitutional rights can be fairly distinguished from the case at bar, but he makes no effort to distinguish the same. The uncontradicted testimony of the arresting officer shows that the search and arrest were "on suspicion" and not that the Petitioner was violating any law nor suspected of having committed any particular offense (Rec. 8).

People v. *Exum*, 382 Ill. 204, cited in the Answer of the respondent (p. 7) has been distinguished in the petition for rehearing filed by the Petitioner in the Supreme Court of Illinois (Rec. 37).

The key obtained by the illegal search of the Petitioner (Rec. 8) and used to unlock the trunk of the automobile are not shown to be the same keys used by the driver of the car who escaped. Whether or not the Petitioner was intoxicated at the time shots were fired by the officers (Rec. 6), it is evidenced by the fact that he was sobered up or awakened by the firing of the shots, and the undisputed testimony of the arresting officer is that the Petitioner, "fell out of the car after the car stopped" and that the car was stopped by the firing of a shot. We believe it is fair to assert that the firing of the shot either sobered the Petitioner or awakened him.

The Petitioner being a citizen of the United States and having certain constitutional rights guaranteed to him by the Fourteenth Amendment of the Federal Constitution, should not be denied a review of his case where the Record so clearly shows that his constitutional rights have been disregarded by the highest Court of the State and that his rights were claimed under the Federal Constitution.

It is respectfully submitted that this Honorable Court will grant the prayer of the Petition for a Writ of Certiorari.

Respectfully submitted,

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Counsel for Petitioner.

(24)

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1943

No. 774

JACK BARG,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION OF JACK BARG, PETITIONER, FOR REHEARING AND RECONSIDERATION, AND SUPPORTING BRIEF.

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Respondent.

PETITION OF JACK BARG, PETITIONER, FOR REHEARING AND RECONSIDERATION.

MAY IT PLEASE THE COURT:

The Petitioner, Jack Barg, comes now and files this, his petition for rehearing and reconsideration and respectfully requests this Honorable Court to vacate and set aside the order entered April 10, 1944, denying the application by your petitioner for Writ of Certiorari to the Supreme Court of Illinois, and Supporting Brief.

In the instant case the application for the issuance of a Writ of Certiorari to the Supreme Court of the State

of Illinois to review the final judgment of conviction against the petitioner, having been denied without an expression by this Honorable Court of its reason for such denial, which is the usual practice upon such an application; the numerous grounds for denial of an application of this kind as shown by the authorities collected and discussed in *Jurisdiction of the Supreme Court of the United States*, Robertson and Kirkham (1936), pars. 287, 288, and the further restriction under the practice in the preparation of Petitions for Rehearing and Reconsideration, prohibiting the petitioner from rearguing or attempting to present more clearly the questions and reasons for granting the application (*Jurisdiction of the Supreme Court of the United States*, Robertson and Kirkham (1936), par. 288, p. 552), which questions and reasons were originally submitted, all have a tendency to place the applicant in a quandary as to the proper and correct contents of his Petition for Rehearing and Reconsideration, which will not only meet with the approval of this Honorable Court, but will aid the Court in the discovery of a valid reason for granting to this humble petitioner the prayer of his petition for the issuance of the Writ of Certiorari.

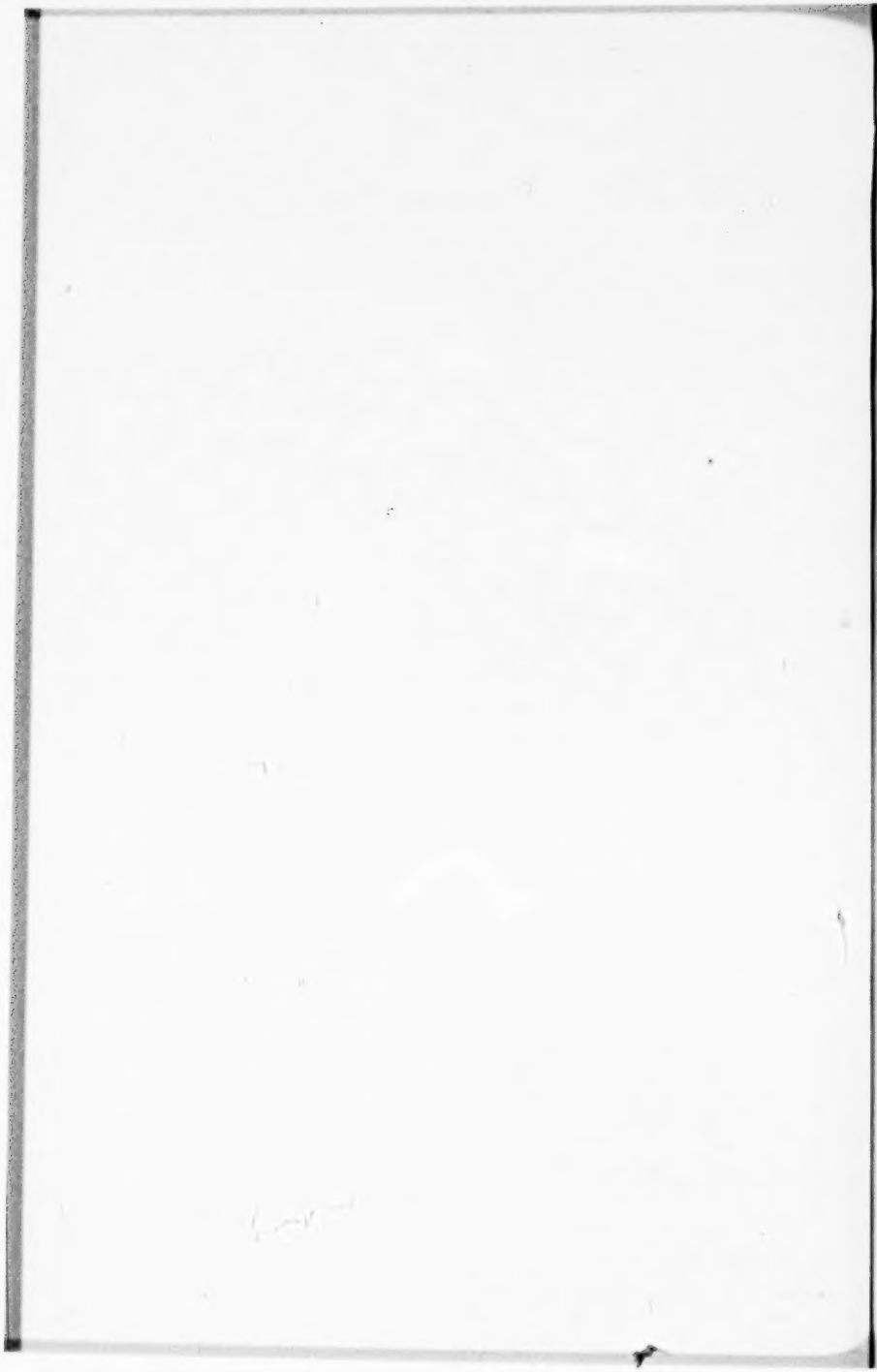
We appreciate the fact that the first question for determination in this proceeding is, **was the petitioner denied the due process of law and the equal protection of the laws as guaranteed by the 14th Amendment of the Federal Constitution?**

We further appreciate the fact that the second question then to be considered by this Honorable Court is, **does the record in this proceeding show that the petitioner claimed the benefits of his federal constitutional rights in the State Court proceedings and that the highest Court in the state by its final judgment denied to the petitioner his federal constitutional rights so claimed?**

The petitioner respectfully submits to this Honorable Court:

1. That he was denied the due process of law and the equal protection of the laws as guaranteed by the 14th Amendment of the Federal Constitution.
2. That the record in this proceeding shows that the petitioner claimed the benefits of his Federal Constitutional rights in the state court proceedings and that the highest court in the state by its final judgment denied to the petitioner his Federal Constitutional rights so claimed.

It is further respectfully submitted that the contention of the petitioner as stated in the above and foregoing paragraphs 1 and 2, being supported by the record in the case at bar, this Honorable Court should allow this Petition for Rehearing and Reconsideration, grant to your petitioner the prayer of his application for Writ of Certiorari and make such disposition of this case as justice may require.



IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1943

No. 774

JACK BARG,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR REHEARING AND RECONSIDERATION.

I.

THE PETITIONER WAS DENIED THE DUE PROCESS OF LAW AND THE EQUAL PROTECTION OF THE LAWS AS GUARANTEED BY THE 14TH AMENDMENT OF THE FEDERAL CONSTITUTION.

The term "due process of law" is so incomprehensive and elastic that any effort on the part of the petitioner to state a fixed definition would be futile. It would be difficult, perhaps impossible, to find in the reports a defini-

tion of the term "due process of law" or "law of the land" which is accurate, complete and appropriate under all circumstances. The peculiar necessities which call for the action of an officer, and whether a power was exercised in the same manner prior to the adoption of the Constitution, without being regarded a violation of the principles of the Magna Charta may each be considered in determining whether a party litigant has been accorded the "due process of law" within the meaning of the 14th Amendment of the Federal Constitution. The term "due process of law" is usually declared as an alternative for the expression contained in the Magna Charta—"*nisi per legale judicium parium suorum, vel per legem terrae.*"

The term, "equal protection of the laws" is also as elastic and definitely indefinable as the term "due process of law" and to this Honorable Court will be left the final construction of the terms herein mentioned and their application to the state of facts appearing in the record, the petitioner will not encumber this petition with the citation of numerous authorities or quotations from previous opinions rendered by this Honorable Court and the highest courts of the states of the United States. It will suffice to say that the Constitution has committed to this Honorable Court the responsibility of the construction and application of the provisions of the 14th Amendment, and the petitioner will therefore make a sincere effort to bring his case within the terms of the 14th Amendment so as to entitle him to its protection and a review of his conviction by this Honorable Court.

What the Record Shows.

The record shows a timely petition and motion to suppress all evidence resulting from the search of the petitioner's automobile prior to his arrest (R. pp. 5, 6). The petition and motion contains facts showing: 1. That the

petitioner was not driving his automobile but was riding as an occupant. 2. That he was not violating any laws of the State of Illinois or City of Chicago. 3. That said police officers on **mere suspicion** searched the trunk of the automobile and found automobile tires and other personal property. 4. That the search of the automobile trunk was made after the officers had searched the person of the petitioner from whose person they took the key to unlock the automobile trunk. 5. That after the search of the automobile trunk and arrest of the petitioner was made by the officers, criminal proceedings were based upon the result of the search of the automobile trunk of the petitioner. 6. That the searches and seizure were made on *mere* suspicion and without warrant or other process. 7. That the automobile tires were in possession of the officers and petitioner was informed and believed the State's Attorney intended to use the same as evidence against him during trial of the criminal proceedings. 8. That the use of the goods taken from the automobile trunk of the petitioner as evidence against him would violate his constitutional rights (R. p. 6). The petition concluded that the goods taken from his automobile trunk and all evidence obtained as a result of the search by the officers be suppressed.

The state did not file an answer to the petition and motion and on the hearing of the motion before trial, called as its *only* witness the arresting officer (R. pp. 7, 8). The petitioner as his only witness testified to facts sustaining the allegations of his petition (R. pp. 6, 7). The arresting officer also testified to facts corroborating the testimony of the petitioner, the pertinent parts of the testimony of the officer relative to the search and arrest are as follows (R. p. 8):

> "This man fell out of the car. He fell out after the car stopped. The other man got away. Before the car stopped we did not sound the siren because we

were not allowed to. We had no means of signaling him. The car was stopped by my partner firing a shot at it before it stopped. I came up to Barg first and **searched him and then searched the automobile.** The car was not speeding and **they were not violating any law.** The only thing that attracted our attention to the car was that the lights were out on the car. **When we searched the car we found some tires in the trunk.** We had to **unlock the trunk and got the keys from the defendant when we searched him. We had no warrant for his arrest at the time we arrested him. We stopped the car on suspicion. The stopping of the car and the searching of the defendant and the car was on suspicion that he might be involved in something"** (R. p. 8). (Emphasis ours.)

Due Process of Law.

This Honorable Court has held that when the question of a denial of the due process of law in the selection of a grand jury is raised by a defendant in a criminal prosecution in a state court, a written motion or petition is filed setting up facts which are undenied, that the only question before the court is whether the petitioner made out a prima facie case showing a violation of his rights under the due process of law clause of the 14th Amendment. *Hill* v. *Texas*, 316 U.S. 400, 402. A stronger case is made by the record in the case at bar in that the facts set up in the petition and the testimony of the arresting officer, called as a witness for the state, on the hearing of the motion to suppress the evidence, corroborates the testimony of the petitioner and sustains the facts set forth in the petition that the search and arrest were on mere suspicion. In *Brown* v. *Mississippi*, 297 U.S. 278, 285 the question of the illegality of certain confessions was raised, this Honorable Court observed (p. 285):

> "The facts are not only undisputed, they are admitted, and admitted to have been done by officers of the state, etc."

We are limiting our claim that the petitioner was denied his constitutional rights under the 14th Amendment of the Federal Constitution, to the proceedings on the motion to suppress the evidence obtained as a result of a search without a warrant or other process and on **bare suspicion.** The only witness for the state testified that his sole reason for making the search of the person and automobile locked trunk of the petitioner **"was on suspicion that he might be involved in something."** No other ground or reason is found in the testimony of the arresting officer, although the State's Attorney and the Supreme Court of Illinois has injected in the record a ground for the search and arrest other than that stated by the officer who made the arrest and is the only person who could state the grounds upon which he made the search and arrest.

It is respectfully urged that a search, followed by an arrest, both of which are made on suspicion and the use of contraband articles resulting from such illegal search and arrest, over the objection of a defendant timely made, by motion to suppress, in a criminal case is as violative of his constitutional rights under the due process of law clause of the 14th Amendment of the Federal Constitution as is the admission in evidence of an involuntary confession of a defendant. This Honorable Court in *Brown* v. *Mississippi*, 297 U.S. 278, 284 reversed a judgment of conviction as violative of the due process of law clause of the 14th Amendment because of the admission of an involuntary confession admitted in evidence over the objection of the defendant where this court in quoting from the dissenting opinion of Judge Griffith of the state supreme court states:

> "The evidence upon which the conviction was obtained was the so-called confessions. **Without this evidence a peremptory instruction to find for the defendants would have been inescapable.**" (Emphasis ours.)

In the case at bar without the evidence obtained by the police officer as a result of the search of the locked automobile trunk of the petitioner, after having searched the person of the petitioner, all of which were on bare suspicion, as stated by the officer himself, a finding of not guilty would be inescapable. This Honorable Court has repeatedly held that the admission of an involuntary confession over the timely objection of a defendant in a criminal case was a denial of due process of law to such defendant and a judgment of conviction resulting would be declared void. *Brown* v. *Mississippi*, 297 U.S. 278, 286; *Chambers* v. *Florida*, 309 U.S. 227, 238.

In the case at bar there was enough before the trial court adduced on the motion to suppress to make known to the court that the search and arrest were on mere suspicion, and therefore illegal, and the failure of the court to sustain the motion was sufficient for the Supreme Court of Illinois to have reversed the judgment. This Honorable Court in *Brown* v. *Mississippi*, 297 U.S. 278, 283 again quotes from the dissenting opinion of Judge Griffith and states (p. 283):

> "There was thus enough before the court when these confessions were first offered to make known to the court that they were not, beyond all reasonable doubt, free and voluntary; and the failure of the court then to exclude the confessions is sufficient to reverse the judgment, **under every rule of procedure that has been prescribed and hence it was not necessary subsequently to renew the objections by motion or otherwise.**" (Emphasis ours.)

"Due process of law" prohibits compulsion of a defendant to give evidence in a criminal case as a witness against himself. Art. II, Sec. 10, Illinois Constitution; 5th Amendment United States Constitution. It is under these provisions of the Constitutions, both state and Federal, that

the admission in evidence in a criminal case, over the timely objection made by a defendant, that this Honorable Court has reversed judgments of convictions affirmed by the highest court of the state, on the ground that such convictions violated the due process of law clause of the Federal Constitution. Under these same provisions of both state and Federal Constitutions the courts have held that all evidence obtained by an illegal search and seizure, admitted against a defendant in the trial of a criminal case, where an objection is timely made and conviction results, to be violative of the due process of law clauses of both state and Federal Constitutions. Art. II, Sec. 2, Illinois Constitution; 14th Amendment, Sec. 1 United States Constitution. Such illegal search and seizure has also been held to violate both state and Federal Constitutions. Art. II, Sec. 6, Illinois Constitution; Sec. 1, 14th Amendment, United States Constitution. We will not restate the long line of cases sustaining this contention and refer this Honorable Court to the petition for Writ of Certiorari filed in this cause (pp. 18-22). Since the denial of the application in the case at bar this Honorable Court on May 1, 1944 in *Ashcraft* v. *Tennessee*, 391 October Term, again sustained the contention of the petitioner that the admission of an involuntary confession over the objection of a defendant rendered the conviction void as violative of the due process of law clause of the 14th Amendment and states:

> "The Constitution of the United States stands as a bar against the conviction of any individual in an American Court by means of a coerced confession."

Where it appears that a defendant has been denied the due process of law and the equal protection of the laws as guaranteed by the 14th Amendment of the United States Constitution, his conviction should be set aside or his im-

prisonment terminated although he failed to raise a Federal constitutional question during the trial. The violation of constitutional rights in a criminal case may appear from facts and circumstances. *Mitchell* v. *Youell*, 130 F. 2d 880 (CCA 4). In the last cited case a Writ of Habeas Corpus was held to be a proper remedy to secure the discharge of a prisoner, where it appeared that he had been denied the due process of law in violation of the 14th Amendment to the Constitution of the United States. It appeared from the petition that the prisoner had been placed upon trial without counsel, and the penalty imposed was disproportionate for the offense.

An arrest, search or seizure on mere suspicion is illegal and unreasonable.

This Honorable Court in *Chambers* v. *Florida*, 309 U.S. 227, 238, and numerous other cases has condemned an arrest on suspicion without a warrant and where such arrest results in compelling a defendant to make an involuntary confession which is admitted in evidence in a criminal case over the timely objection of the defendant, a conviction resulting from such procedure has been held to violate the due process of law clause of the 14th Amendment to the Federal Constitution. This Honorable Court in reversing the judgment of conviction states (p. 238):

> "It would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions of these petitioners, and the use of the confessions thus obtained as the basis for conviction and sentence was a clear denial of due process."

In the case at bar the search, seizure and arrest were on mere suspicion which fact is admitted and not controverted. The use of contraband property resulting from such search,

seizure and arrest as the basis for conviction and sentence of the petitioner, where the record shows a timely motion to suppress the evidence, is a clear denial of the due process of law.

The Supreme Court of Illinois (R. p. 27) holds that, arrests upon bare suspicion are not permitted under the law of the State of Illinois. The cases cited in the Petition for Writ of Certiorari (R. pp. 6, 18-22) fully sustain the contention of the petitioner and will not be repeated.

We believe it to be elemental, that every search, seizure or arrest, admitted or proved to be on **bare suspicion** is unreasonable and illegal, prohibited by both state and federal constitutions, Art. 2 Illinois constitution, sec. 6; Sec. 1, Federal Constitution, 14th Amendment.

It is the duty of the Supreme Court of the United States to appraise the evidence as it relates to the constitutional right of a defendant.

In *Chambers* v. *Florida*, 309 U.S. 227, 228, this Honorable Court laid down the well-known rule of law that, where a defendant claims that he has been denied the due process of law and the equal protection of the laws as guaranteed by the 14th Amendment it is the duty of this Honorable Court to make an independent determination, by a review of the facts upon which the issue necessarily turns, and states (pp. 228, 229):

> "First. The State of Florida challenges our jurisdiction to look behind the judgments below claiming that the issues of fact upon which petitioners base their claim that due process was denied them, have been finally determined because passed upon by a jury. However, use by a State of an improperly obtained confession may constitute a denial of due process of law as guaranteed in the Fourteenth Amendment. Since petitioners have seasonably asserted the

> right under the federal Constitution to have their guilt or innocence of a capital crime determined without reliance upon confessions obtained by means proscribed by the due process clause of the Fourteenth Amendment, **we must determine independently whether petitioners' confessions were so obtained, by review of the facts upon which that issue necessarily turns.**" (Emphasis ours.)

This principle of law is supported in *Smith* v. *Texas*, 311 U. S. 128, 130 and cases cited in the *Smith* case.

The petitioner was entitled to have his guilt or innocence determined without reliance upon the contraband goods illegally seized after a search on bare suspicion of his automobile. The admission by the arresting officer (R. p. 8) that the search, seizure and arrest were made on **bare suspicion**, we submit is sufficient to sustain the contention of the petitioner that he was denied due process of law and the equal protection of the laws as guaranteed by the 14th Amendment.

Both the trial court and the Supreme Court of Illinois were of opinion that the evidence failed to support the charge that the search, seizure and arrest were on bare suspicion. For that reason the Supreme Court approved the trial court's action in denying the petitioner's timely motion to suppress the evidence illegally obtained from the petitioner. But the question decided rested upon a charge of denial of equal protection of the laws, a basic right protected by the Federal Constitution. And it is therefore the responsibility of this Honorable Court to appraise the evidence as it relates to this constitutional right. *Smith* v. *Texas*, 311 U.S. 128, 130. The case at bar is identical with the case, *Smith* v. *Texas*, 311 U.S. 128, as it relates to the responsibility of this Honorable Court to appraise the evidence. A fair and just appraisal of the

evidence on the motion to suppress must inevitably result in this Honorable Court finding that the search, seizure and arrest were on bare suspicion, unreasonable and violative of the 14th Amendment of the Federal Constitution.

II.

THE RECORD IN THIS PROCEEDING SHOWS THAT THE PETITIONER CLAIMED THE BENEFITS OF HIS FEDERAL CONSTITUTIONAL RIGHTS IN THE STATE COURT PROCEEDINGS AND THAT THE HIGHEST COURT IN THE STATE BY ITS FINAL JUDGMENT DENIED TO THE PETITIONER HIS FEDERAL CONSTITUTIONAL RIGHTS SO CLAIMED.

Since the petitioner has referred to the various pages of the record supporting the propositions of law urged in his behalf, we believe it only necessary to briefly point out the pages of the record which show that the petitioner claimed the benefits of his constitutional rights in the trial and Supreme Courts. The petition to suppress evidence claimed to have been illegally obtained recites that the constitutional rights of the petitioner were violated (R. pp. 5, 6). The argument of counsel for the petitioner in the trial court (R. pp. 9-11) clearly shows that illegality of the search and arrest were urged. The first and second assignment of errors in the Supreme Court again challenged the overruling of the motion to suppress and the admission of the evidence obtained by the illegal search and seizure was again urged. The Supreme Court in its opinion also denies the contention of the petitioner that his constitutional rights were violated (R. p. 27) and the Petition for Rehearing (R. p. 48) urges that the opinion of the Supreme Court denied to the petitioner the equal protection of the laws and the due process of law as guar-

anteed by the 14th Amendment of the Federal Constitution. We believe the record clearly shows that the petitioner has continuously urged the benefits of the 14th Amendment of the Federal Constitution and that the record sustains the claim. Without the admission of the evidence illegally secured there would not have been any evidence to sustain the conviction and we dare say that if the petitioner had been charged with the burglary of a building and the record failed to contain any evidence that he was near the building alleged to have been burglarized, that this Honorable Court would not hesitate to review a judgment of conviction although the same had been affirmed by the highest court of the state.

It is respectfully and humbly requested, by the petitioner, that this Honorable Court will grant a rehearing to the petitioner and reconsider the points of well-settled law herein urged on his behalf.

Respectfully submitted,

RICHARD E. WESTBROOKS,
BRIEN McMAHON,
WALTER E. GALLAGHER,
Counsel for Petitioner.

Certificate of Counsel.

I, Richard E. Westbrooks, counsel for the above named Jack Barg, do hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for delay.

RICHARD E. WESTBROOKS,
Counsel for Petitioner.